READING LEGISLATION AND IVOR RICHARDSON

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I INTRODUCTION

In this paper, I endeavor to compare approaches to statutory interpretation in New Zealand in the early 1960s with those prevalent in the year 2000. I do so with particular reference to the judgments of Sir Ivor Richardson who will retire as President of the Court of Appeal of New Zealand on 24 May 2002. At my starting point Sir Ivor was in private practice in Invercargill, but in June 1963 he moved to Wellington and took up a position as Crown Counsel in the Crown Law Office.

I first met Sir Ivor in 1967, when he became Professor of English and New Zealand Law at Victoria University of Wellington and taught me taxation law. A number of those who participated in his most stimulating Master's level tax classes at that time are present here today. My own other legal associations with him since have included opposing him, soon after I entered practice, as counsel in a tax case, in the High Court.[1] I have also appeared before him many times over the past 24 years in the Court of Appeal. For eleven years I did so myself as counsel appearing on behalf of the Crown's interest.

More recently, for nearly two years, I have been Sir Ivor's junior colleague in the Court of Appeal during the final period of his presidency. As many present will know, serving under his judicial leadership has been a very special experience for me. I will not dwell on our other associations, including those as members of the Council of this University, but given what I have said, you will appreciate that I feel greatly privileged to be invited to contribute to this celebration of Sir Ivor's career in the law.

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* Judge of the Court of Appeal of New Zealand. The author acknowledges the helpful comments on this paper in draft by Justice Keith and Grant Liddell and the research assistance of Trudie Griffin and Thomas Geuther.

1 *Dobbs v Inland Revenue Commissioner* (NZ) (1974) 4 ATR 221 (HC).

II OBJECT OF STATUTORY INTERPRETATION

Parliament has "full power to make laws".[2] The Judges' role is to interpret and apply them in the course of determining issues raised by court proceedings. In doing so they are of course bound by their oath to make decisions according to the law.

Behind this clear cut and uncontroversial statement of the role of judges lies a difficulty which is at the heart of statutory interpretation. Words are not precise instruments for conveying ideas and any written text of substance has the potential to raise problems over the meaning of the words used. Ambiguity can arise both from within words individually, from their linkage with other words and from the context in which words are used.

Of course good procedures in developing and presenting a text can reduce the scope for alternative possible meaning of words in it. So can the skills of a good drafter. New Zealand readers of legislation have reason to be grateful here for the work of the Office of Parliamentary Counsel, including its recent initiatives in the presentation of legislation, the Law Commission, and the Legislation Advisory Committee, in particular in the formulation of principles for legislation.[3] But the reality is that neither systems nor people can anticipate all the situations to which legislation will be applied. The content of current legislation is, in most cases, necessarily general. Statute rules applicable to the whole community, or to large sections of it, must be drafted to be applied in circumstances which cannot be precisely anticipated let alone specified. As well history shows us it is beyond intellectual ingenuity to frame legislation using words in a way which avoids differing impressions of their meaning. There are, furthermore, practical problems of drafting legislation in New Zealand, including the need to secure the necessary political approval from conflicting political interests of coalition governments generally produced by the Mixed Member Proportional (MMP) electoral system, coupled with the unrelenting urgency in which the task is constantly performed.

It is the inevitability of ambiguity, in the sense of different possible meanings of words in statutes, that gives rise to the need for principled interpretation of statute law by the courts. The object is always to ascertain the meaning of the words Parliament has used. To the extent that the words being considered are capable of different meanings, courts

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2 Constitution Act 1986, s 15.

3 New Zealand Law Commission *The Format of Legislation* (NZLC R27, Wellington, 1993); New Zealand Law Commission *Legislation Manual: Structure and style* (NZLC R35, Wellington, 1996), New Zealand Law Commission *A New Interpretation Act To Avoid "Prolixity and Tautology"* (NZLC, R17, Wellington, 1990); New Zealand Legislative Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation* (Department of Justice, Wellington, 2001); <http://www.pco.parliament.govt.nz/Projects/format/survey.htm> (last accessed 28 June 2002).

endeavour to ascertain in a principled way which of them is the more probable meaning. This is the presumed meaning sometimes described as the "legal meaning".[4] It involves in my view ascertaining what the words mean rather than a concept of what the legislators had in mind. Over the centuries different approaches have been followed by Judges to their task of interpreting the legislation. In New Zealand there was a major shift in judicial approach over the last forty years of the twentieth Century. Sir Ivor was a central judicial figure in that shift and accordingly features prominently in my discussion.

III APPROACHES TO INTERPRETATION IN 1960

Those of us who commenced our acquaintance with principles of statutory interpretation at law schools in New Zealand in the early 1960s were quickly exposed to criticism of the approaches to statutory interpretation then being applied by the New Zealand courts. In particular two articles were written at this time by Mr D A S Ward, then the Law Draftsman, the position now known as Chief Parliamentary Counsel.[5] They were influential in the teaching of statutory interpretation and gave a generally accurate picture of judicial ambivalence concerning the correct approach to statutory language at that time.

Ward's first article[6] was a piece of empirical research. It was commissioned as part of a research project in which he examined reported judgments to discover whether there had been changes to the courts' approach to interpretation of legislation over the previous 20 or 30 years. His inquiry was into whether there was evidence that social and economic changes and the development of the welfare state had impacted on judicial attitudes to interpretation.

He identified the three main approaches to interpretation currently used by the New Zealand Courts as being the literal rule, the golden rule and the mischief rule. Under the literal rule plain and unambiguous words in statutes were to be construed in their ordinary sense. This raised issues as to what was plain. The golden rule provided a gloss on the literal rule. If application of the literal rule gave rise to an interpretation which was absurd the judge would modify it. This raised the question of what was an absurdity. Finally, there was the mischief rule, developed from principles laid down by Lord Coke in

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4 Francis Bennion *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford University Press, New York, 2001) 18.

5 Denzil AS Ward "Trends in the Interpretation of Statutes" (1957) 2 VUWLR 155; [1958] NZLJ 326 and 342; Denzil AS Ward "A Criticism of the Interpretation of Statutes in the New Zealand Courts" [1963] NZLJ 293.

6 Ward, above.

Heydon's case.[7] It required that statutes be construed as remedial of the mischief they were enacted to cure. The principles were said by Lord Coke to have been laid down by the Barons of the Exchequer for the sure and true interpretation of all statutes in general "be they penal or beneficial; restorative or enlarging of the common law".[8] The main practical question raised by the mischief rule was how the mischief concerned was to be ascertained.

Ward's view was that New Zealand Courts in 1958, on the whole, were tending to apply the literal rule and the mischief rule and where the outcome was considered inappropriate they would apply one of the presumptions of interpretation. No single one of these approaches was more favoured than others. Courts rather appeared to invoke whichever rule produced a result in accord with the Judge's perception of the justice of the case before the court. Usually Judges gave no reasons for their choice of approach and at times even failed to indicate which rule or cannons had guided them.

The principal criticism Ward made of this rather ad hoc approach was that the Courts were failing to apply, consistently, the statutory direction on interpretation given in the Acts Interpretation Act 1924 and in particular by section5(j) of that Act. It provided:

> **5. General rules of construction-**The following provisions shall have effect in relation to every Act of the General Assembly, except in cases where it is otherwise specially provided:
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> (j) Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit:

Ward pointed out that section 5(j), which had first been enacted in the Interpretation Act 1888, was "a modern version of the mischief rule in statutory form".[9] His main point was that the provision was a positive statutory direction to apply that approach to interpretation unless it was "otherwise specially provided"[10] in any Act. The Privy Council in 1904 in a judgment delivered by Lord Lindley had said that application of the literal rule "to defeat the plain intention of the Legislature instead of construing the words

7 *Heydon's case* (1584) 3 Co Rep 7a; 76 ER 638 (Ex Ch).

8 Ward, above, 327.

9 Ward, above 327.

10 Acts Interpretation Act 1924, s 5(j).

to give effect to that intention was to run counter to (section 5(j))".[11] Nevertheless, Ward's research indicated the Courts were making use of section 5(j) in only a minority of cases, preferring to rely on statements of principles in English textbooks on statutory interpretation, and the classic judicial statements of canons of interpretation that had been developed in England over the centuries. There was no equivalent to section 5(j) in the Interpretation Act of the United Kingdom at that time nor indeed has there ever been. Ward argued that, properly applied, section 5(j) would preclude application of common law principles such as that penal acts and taxing acts should be interpreted strictly. Resort by Judges to English textbooks was preventing proper application of section 5(j). He concluded his first paper with this summary of his views:[12]

> The fair, large and liberal construction rule laid down by s5(j) of the Acts Interpretation Act 1924 is not applied in all cases. It is not even applied in a majority of cases. Other rules laid down by that Act are not always applied when they should be. It need hardly be said that the responsibility for this situation rests mainly on counsel.

Ward returned to his theme in his second paper which he delivered at the 1963 New Zealand Law Society Conference.[13] In it he developed the view that it was necessary for the Courts, in the interpretation of legislation, and in deciding whether statutory language applied to the facts of a given case, to ascertain the intent and object of the Act.[14] Having done so a Court was in a position to apply "a fair, large and liberal construction"[15] as would best attain the object according to its true intent, meaning and spirit. Section 5(j) required that approach.

The "object intent and spirit"[16] were generally to be discovered by a careful study of the Act. Where they remained elusive there was room for application of the canons of construction but only, to the extent they were consistent with section 5(j). Ward also adhered to the traditional view that it was inappropriate to ascertain the true meaning and spirit by any reference to the Parliamentary history.

He concluded this paper by reiterating that New Zealand Courts remained inconsistent in their attitude to statutory interpretation and with few exceptions were not approaching

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11 *Smith v McArthur* [1904] AC 389, 395, 398 (HL) Lord Lindley.

12 Ward, above, 344.

13 Denzil AS Ward "A Criticism of the Interpretation of Statutes in the New Zealand Courts" [1963] NZLJ 293.

14 Ward, above, 294.

15 Ward, above, 296.

16 Ward, above, 293, 297.

it in the way Parliament had directed.[17] Section 5(j) was, he felt, being ignored by the Courts. In case anyone missed the point he abandoned his earlier courtesy of blaming counsel for this state of affairs.

Views expressed during the discussion of the second paper at the Law Conference ranged from Mr Cooke's view that there was great attraction in the suggestion the Courts should use a freer hand in approaching statutes[18] to Mr Dugdale's observation that if he were in Mr Ward's position as Chief Parliamentary Counsel he "would not be rooting for section 5(j) becoming more fashionable but would be wanting to repeal the jolly thing".[19] Mr Ward diplomatically promised to bear that suggestion in mind.[20] One pertinent observation made during the discussion was that application of section 5(j) was unlikely of itself to produce different results in many cases unless the courts were prepared to look at Parliamentary debates and similar material.[21]

Ward only touched on why judges in 1960 were largely ignoring the purposive approach of section 5(j). He did however in both papers refer to an earlier internationally well known and highly perceptive criticism of current judicial technique in interpretation written in 1938 by Professor John Willis of Dalhousie Law School.[22]

Willis had been blunt. He argued that in statutory interpretation courts invoke rules that satisfied their sense of justice in the case before them.[23] To do this they treated all three rules of interpretation as valid, choosing from the literal, golden or mischief rule whichever the occasion demanded but, he thought understandably, never giving reasons for their choice.[24] As a result the important practical question for lawyers, which of the three approaches will the court adopt, did not admit of a principled answer.[25]

Willis had strong views on the place of the canons of legislative intent in judicial interpretation of statutes. Consistent with his main theme he opined that judicial addiction to these ancient presumptions had nothing to do with ascertaining the intent of the

17 Ward, above, 299.

18 Ward, above, 300.

19 Ward, above, 301.

20 Ward, above, 302.

21 Ward, above, 300.

22 Professor John Willis "Statute Interpretation in a Nutshell" (1938) 16 Can Bar Rev 1, 16.

23 Willis, above.

24 Willis, above.

25 Willis, above

legislature and everything to do with controlling that intent.[26] In his view judicial approaches to interpretation had become a common law Bill of Rights for Commonwealth judges.[27] Reading between the lines of his own papers it seems clear that Ward agreed with the Willis analysis and disapproved of the judicial practice. His concern was of a constitutional kind, reflecting the imperative of democratic principle. The Judges should interpret and give effect to legislation in the manner Parliament had directed.

Ten years after Willis wrote "Statute Interpretation in a Nutshell" Justice Frankfurter of the United States Supreme Court delivered his famous lecture.[28] For Frankfurter statutes were instruments of policy arising out of specific situations and addressed to attainment of particular ends. Legislation accordingly always had an aim and a policy which was evinced in the language of the statute, as read in light of other external manifestations of its purpose. That, in his opinion, is what the Judge should seek to give effect to when interpreting the statute. Frankfurter distrusted reference to seeking the "intention" of the legislature as such. He quoted Justice Holmes as saying: "I don't care what their intention was, I only want to know what they mean."[29]

Frankfurter also rejected the English rules of construction as too simplistic.[30] The rigidity of interpreting language merely by reading it disregarded the fact that acts were like organisms which exist in their environment.[31] He was well informed on English legal history, expressing approval of the resolutions in *Heydon's* case and the practice of including explicit recitals in early English legislation to define the mischief to which an enactment was directed.[32] That practice had ceased but Frankfurter noted that Professor Laski had urged that the old practice of including preambles in legislation should be restored, or a memorandum of explanation prepared which would be read with the proposed legislation.[33]

In the United States, according to Frankfurter, as the area of governmental regulation widened, the impact of the legislative process had increasingly compelled Judges in the

26 Willis, above, 17.

27 Willis, above, 17.

28 Felix Frankfurter "Some Reflections on the Reading of Statutes" (1947) 47 Colum L Rev 527.

29 Frankfurter, above, 538.

30 Frankfurter, above, 541.

31 Frankfurter, above.

32 Frankfurter, above, 541-542

33 Harold Laski "Note to the Report of the Committee on Minister's Powers (1932), Cmd 4060, Annex V, 135.

course of interpretation to give consideration of all that convincingly illuminated an enactment. As he put it:[34]

> Legislative reports were increasingly drawn upon statements by those in charge of legislation, reports of investigating committees, recommendations of agencies entrusted with enforcement of the laws, etc etc.

and later:[35]

> Courts examine the forms rejected in favour of the words chosen. They look at later statutes "considered to throw a cross light" on an earlier enactment… The consistent construction by an administrative agency charged with effectuating the policy of an enactment causes very considerable weight.

Nevertheless he accepted that some caution in this approach was required. A detailed report by a legislative committee bearing on the immediate question may settle a matter, but a loose statement, even by the committee's chairman made impromptu in the heat of debate would not.[36] Above all in his view: "while the courts are no longer confined to the language they are confined by it."[37]

IV SCHEME AND PURPOSE AND SECTION 5J

When Professor Richardson began his lectures on statutory interpretation to the Legal System class at Victoria University he provided students with references to section 108 of the Land and Income Tax Act 1954, the general anti-avoidance provision; and the judgment of Woodhouse J in *Elmiger v Commissioner of Inland Revenue*,[38] a case which he had argued successfully for the Crown. In his judgment Woodhouse J said that since 1930:[39]

> There has been a growing awareness by the Legislature and the Courts alike that ingenious legal devices contrived to enable individual taxpayers to minimise or avoid their tax liabilities are often not merely sterile or unproductive in themselves (except perhaps in respect of their tax advantages for the taxpayer concerned), but that they have social consequences which are contrary to the general public interest.

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34 Frankfurter, above, 542.

35 Frankfurter, above, 543.

36 Frankfurter, above.

37 Frankfurter, above. This extract is cited in *Tertiary Institutes Allied Staff Association Inc v Tahan*a [1998] 1 NZLR 41, 53 (CA).

38 *Elmiger v Commissioner of Inland Revenue* [1966] NZLR 683 (SC).

39 *Elmiger,* above, 686-687.

The case would presumably have indicated to Sir Ivor and his students the importance of a purposive approach to the anti-avoidance provision. Whether or not that is so, as we shall see, in his subsequent judicial career Justice Richardson has made plain where he stands on that question.

Sir Ivor Richardson has been at the forefront of the move over the last 25 years in the New Zealand courts to give the purposive approach a dominant place in statutory interpretation. He recognises that the interpretative approach taken by different Judges at different times will depend on their perceptions of community values and attitudes in their own society.[40] But, as he said in his Wilfred Fullagar Memorial Lecture in 1985:[41]

> In New Zealand one test and one test only is mandated by statute. Under our *Acts Interpretation Act* we are required – and have been since 1888 – to accord to every Act and every statutory provision such fair, large and liberal interpretation as will best ensure the attainment of the object of the legislation according to its true intent, meaning and spirit.

This view has been reiterated by him judicially, for example in *R v Kahu,*[42] where Richardson J delivered the judgment of Cooke P, himself, Casey and Hardie Boys JJ (McKay J dissenting) describing section 5(j) as giving a statutory mandate to the courts to adopt a purposive approach.

The application of section 5(j), in Sir Ivor's view, requires the New Zealand Courts to consider the public policies which the legislation serves. This is at the heart of his own philosophy of interpretation which he spelt out in an address earlier in 1985 in his paper on "Appellate Court Responsibilities and Tax Avoidance."[43] He stated:[44]

> The twin pillars on which our approach to statutes rests are the scheme of the legislation and the purpose of the legislation. Consideration of the scheme of the legislation requires a careful reading in its historical context of the whole Act including the long title, analysing its structure and examining the relationship between the various provisions, and recognising any discernible themes and patterns and underlying policy considerations. It presupposes that in that way the study of the statute or of the group of sections may assist in the interpretation of a particular provision in its statutory context. It may provide a detailed guide to the intentions

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40 Rt Hon Sir Ivor Richardson "Interpretation of Statutes" (Paper presented for the Wilfred Fullagar Memorial lecture, Monash University, Melbourne, 1985).

41 Rt Hon Justice Richardson "Judges as Lawmakers in the 1990s" (Wilfred Fullagar Memorial lecture) (1986) 12 Monash University LR 35, 36.

42 *R v Kahu* [1995] 2 NZLR 3 (CA).

43 Sir Ivor Richardson "Appellate Court Responsibilities and Tax Avoidance" (1985) 2 Aust For 3.

44 Richardson, above, 8.

> of the framers of the legislation and in so doing may cast light on the meaning of the provision in question. Certainly that seems to me a preferable means of ascertaining the purpose or purposes of a provision rather than attempting to elicit it simply from consideration of the language of the section in isolation.

Of course, he acknowledges that the purposive approach can present difficulties, in particular where a statute is lengthy and complex, reflects numerous compromises and incorporates amendments by different drafters enacted over many years.[45] Such legislation squarely raises the traditional difficulty of how is the mischief to be ascertained? Sir Ivor has encountered that dilemma principally in income tax legislation. He considers that, despite its complexity, it is not difficult to discern from the Inland Revenue Acts the basic features of income tax and to consider the statutory provisions in light of their history and how they fit into the scheme of the legislation.[46]

The application of this approach can be seen in Sir Ivor's earliest appellate judgments. For example in 1979 a Court comprising Woodhouse, Cooke and Richardson JJ[47] had considered a number of appeals from the early Supreme Court decisions concerning the property sharing regime that had been enacted by the Matrimonial Property Act 1976. Typically what was at issue was whether their respective shares were to be determined in accordance with contributions to the marriage partnership. The Judges concerned took a common view of the Act although generally delivering individual judgments. Richardson J, in his analysis, discerned policy objectives in the new legislation which led him to emphasise strongly the theme of equal sharing and to take a restrictive view of the circumstances in which there might be departure from it. He described the new Act as "social legislation of the widest general application"[48] and emphasised the importance of it being interpreted "to identify in the clearest of terms the property to be subject to the sharing regime".[49]

His view of the remedial scope of the purposive approach is also illustrated in the judgment of the majority in *R v Kahu*.[50] This case concerned a provision in the Children, Young Persons and their Families Act 1989 authorising the issue of a warrant empowering

45 Richardson "Appellate Court Responsibilities and Tax Avoidance", above, 9.

46 Richardson, above.

47 *Martin v Martin* [1979] 1 NZLR 97, 108-112 (CA).

48 *Reid v Reid* [1979] 1 NZLR 572, 605 (CA).

49 *Reid*, above.

50 *R v Kahu* [1995] 2 NZLR 3 (CA).

the Police or a Social Worker to search for a child and to enter a dwellinghouse for that purpose.

A social worker had entered a dwellinghouse under a warrant accompanied by a police officer. After checking the physical state of the children of the household the social worker asked to look in kitchen cupboards to check there was food there. On doing so cannabis was found. The issue was whether there was due authority for the search of the kitchen cupboards. The majority (Cooke P, Richardson, Casey and Hardie Boys JJ) held there was. McKay J dissented. In delivering the judgment of the majority Richardson J said:[51]

> That construction and conclusion reflect the statutory mandate to the Courts under s5(j) of the Acts Interpretation Act 1924 to adopt a purposive approach to the interpretation of the legislation so as to best ensure the attainment of the object of the provision according to its true intent, meaning and spirit. Allied with that standard approach to interpretation is the important consideration, emphasised by this Court in a number of cases of apparent deficiencies in the statutory drafting, that the Courts should favour an interpretation that will produce a workable result under the legislation. For those reasons we are satisfied that in appropriate circumstances governed by concerns for the welfare of the child as reflected in the criteria under s39, the holder of a warrant under s39 may check the supplies of food in the house and open cupboards for that purpose.

This passage can be linked with that of the Court in *Northland Milk Ltd v Northland Milk Vendors Association*[52] where, in the context of legislation restructuring the milk distribution industry, Cooke P referred to situations where legislation making sweeping changes in a field failed to provide for a real problem. The Court's responsibility then became one of working out a practical interpretation appearing to accord best with the general Parliamentary intention embodied in the Act. In doing so: "The Courts can in a sense fill gaps in an Act but only in order to make the Act work as Parliament must have intended".[53]

V THE LANGUAGE OF THE ACT

Analysis of the statutory scheme to ascertain its purpose is of course simply an approach to interpretation which has to be applied to the language of the statute. In his application Sir Ivor typically starts with the ordinary meaning of the words of the text, going to dictionaries to identify common usages of particular words and the various meanings in which they are used. These often include Australian and North American

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51 *Kahu*, above, 6.

52 *Northland Milk Ltd v Northland Milk Vendors Association* [1988] 1 NZLR 530 (CA).

53 *Northland Milk*, above, 583, Cooke P.

words reflecting the spread of their influence of usages on colloquial New Zealand meaning.

King-Ansell v Police[54] is an early instance of this analytical approach to statutory language. The appellant had been convicted in the Magistrates' Court of publishing a pamphlet with intent to incite ill-will against a group of persons "on the ground of their ethnic origins".[55] In issue was whether Jewish people in New Zealand formed a group with common "ethnic origins". The Court was unanimous that they did.[56] In his judgment Sir Ivor discussed the expanding meaning of "ethnic" by reference to the Oxford English Dictionary, completed by a supplement in 1933, and also to the Supplement which was published in 1972. He referred also to the Heinemann New Zealand Dictionary. Of a submission in that case that the wider meaning was an American aberration not to be followed in New Zealand he said:[57]

> The concern of the Courts being with the New Zealand usage of the English language, New Zealand and British dictionaries are for historical and cultural reasons ordinarily likely to be a better guide than dictionaries published in North America. At the same time it needs to be recognised that our language has been increasingly influenced in recent time by American usages especially through the media and through the use in this country of educational materials published in North America.

The long title of the Race Relations Act 1971 indicated that one of its purposes was to implement the International Convention on the Elimination of All Forms of Racial Discrimination. The obligation undertaken by all parties to that Convention to eliminate racial discrimination in all its forms was part of the background which had to be borne in mind in interpreting the relevant domestic legislation.[58]

Richardson J held that:[59]

> A group is identifiable in terms of its ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn

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54 *King-Ansell v Police* [1979] 2 NZLR 531, 537-8 (CA) Richardson J.

55 *King-Ansell*, above, 531.

56 This outcome accords with the view on the same point expressed by Lord Lester of Herne Hill QC in the context of the United Kingdom legislation enacted in 1965. See his seminal work: Anthony Lester and Geoffrey Bindman *Race and Law* (Penguin, London, 1972) 156-7.

57 *King-Ansell*, above, 540.

58 *King-Ansell*, above, 540.

59 *King-Ansell*, above, 543.

> from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and in the eyes of those outside the group. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents.

His judgment in *King-Ansell* was followed by the House of Lords in *Mandla (Sewa Singh) v Dowell Lee*[60] with passages, including that cited immediately above, as to the meaning of "ethnic origins" expressly adopted in the leading speech of Lord Fraser of Tullybelton with which three other Law Lords agreed. Lord Fraser said that if *King-Ansell* had been cited to the Court of Appeal in England "it might well have affected their decision".[61]

Another example of Sir Ivor's approach to statutory language can be seen in the judgment of a Full Court of the Court of Appeal delivered in *R v Leitch,*[62] a case concerning the statutory regime for the sentence of preventive detention. Section 75 of the Criminal Justice Act 1985 empowered the High Court to impose this indefinite term sentence on two categories of offender, the first those over 21 years who have been convicted of sexual violation and secondly those previously convicted since reaching 17 years of age of a wider category of specified sexual and other violent crimes who subsequently commit another of those specified offences.

The Court's judgment in *Leitch* commences with the observation that section 75 reflects a fundamental purpose of sentencing, namely the protection of society. An analysis of each subsection follows. A key passage in section 75(2) qualifying the power to impose the sentence requires that the High Court "is satisfied that it is expedient for the protection of the public that…(the) offender…should be detained in custody for a substantial period…".[63] The judgment focuses first on the need to be "satisfied" indicating that this called for the exercise of judgment by the sentencing judge. It meant that the Judge had to have made up his or her mind. It was inapt to qualify the language by importing wider notions of degree – such as a standard of proof.[64]

Next the judgment considers "expedient". A computer check had revealed it appeared 1116 times in the statute book. While the term carried shades of meaning the basic meaning of "expedient" was brought out by references to the Oxford English Dictionary

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60 *Mandla (Sewa Singh) v Dowell Lee* [1983] 2 AC 548 (HL).

61 *Dowell Lee* above, 563, Lord Fraser.

62 *R v Leitch* (1997) 15 CRNZ 321 (CA).

63 *Leitch*, above, 327.

64 *Leitch*, above.

(2ed), Webster's Third New International Dictionary, Black's Law Dictionary and, closer to home, The Macquarie Dictionary. They observed "expedient" meant was what was "fit or suitable for the purpose; proper in the circumstances." This set a lower threshold than "necessary", a conclusion reinforced by consideration of the alternative standard "necessary or expedient" (used 411 times in the statute book).[65]

Overall the Court concluded that the standard in section 75 was that the sentencing Court should be satisfied that, in the circumstances of the case, it was appropriate for the protection of the public to detain the offender for a substantial, indefinite period. The judgment went on to list factors likely to be relevant in making that assessment.[66] It emphasised section 75 was a stand alone sentencing provision setting out standards which were not subject of other preconditions or criteria. Ultimately there was a residual discretion in its imposition but that itself could not on the language be fettered by building in a rebuttable presumption that a finite sentence was preferable. All this is derived from the language of the provisions concerned read in its immediate context but also in the context of the statute book as a whole.

VI EXTRA-STATUTORY MATERIALS:

A Legislative History

It will be recalled that during the discussion on Ward's second paper at the 1963 Law Conference the view was expressed by a commentator that a purposive interpretation by reference to section 5(j) was not likely to produce different results unless the Courts were prepared to look at Parliamentary debates and similar material.[67] In 1984 the Court of Appeal signalled it was prepared to examine the legislative steps leading up to enactment of a Bill. Until then the Courts, overtly at least, would look only at reports of advisory committees or commissions and then solely to determine the mischief that an Act was intended to remedy. They would not consider wider extra statutory material at all.[68] Thus explanatory notes to bills, and amendments made during the course of their passage, were excluded territory and even more so what was said in Parliamentary debates.

65 *Leitch*, above, 328.

66 *Leitch*, above.

67 Denzil AS Ward "A Criticism of the Interpretation of Statutes in the New Zealand Courts" [1963] NZLJ 293, 300.

68 John F Burrows *Statute Law in New Zealand* (2ed, Butterworths, Wellington, 1999) 165-170.

In *Marac Life Assurance v Commissioner of Inland Revenue*[69] both Cooke P and Richardson J referred to the *Annual Financial Statement* of the Minister of Finance to support their view that provisions in the Income Tax Amendment Act 1983 did not cover life insurance policies. They did so in passing, without fanfare or detailed explanation, or extensive constitutional discussion. This suggests that it was the disclosure that was novel rather than the practice of reference to legislative history itself. In Australia, in 1984, it had been thought necessary to enact legislation to authorise the courts to refer to legislative history. In England the House of Lords followed the New Zealand court's approach of judicial determination, but after extensive discussion of the issue by the House of Lords in *Pepper v Hart.*[70]

Sixteen years after the *Marac Life Assurance*[71] case my own impression of the New Zealand courts experience is that Hansard most often assists by indicating the context in which the legislation concerned was introduced and enacted. It gives an insight into what those principally responsible for the policy reflected in the legislation had in mind. Only occasionally does Hansard directly assist in clarifying ambiguity in particular language. The fuller contextual picture, however, is often very helpful. Changes made in the text of a draft in a Law Commission or other report or in a Bill following its introduction to the House in the course of its passage are more often of direct assistance in ascertaining meaning than what members say about it.

B International Standards

International standards form another category of extra statutory material which can assist in application of a purposive approach. In 1986, in his Fullagar lecture,[72] Sir Ivor referred to a presumption that Parliament should not be deemed to legislate inconsistently with its international obligations – a principle of interpretation which he described as seeking to set the legal statute in its international context. In *Commissioner of Inland Revenue v JFP Energy*[73] the principle was applied to achieve the uniform interpretation of provisions in a double tax treaty which had become part of New Zealand law.

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69 *Marac Life Assurance v Commissioner of Inland Revenue* [1986] 1 NZLR 674, 701, 708 (CA) Cooke P and Richardson J, respectively.

70 *Pepper v Hart* [1983] AC 513 (HL); Also see the discussion in John F Burrows *Statute Law in New Zealand* (2 ed, Butterworths, Wellington, 1999) 167-171.

71 *Marac Life Assurance v Commissioner of Inland Revenue* [1986] 1 NZLR 694 (CA).

72 Sir Ivor Richardson "Judges as Law Makers in the 1900s" (Wilfred Fullagar Memorial Lecture) (1986) 12 Monash University LR 35, 46.

73 *Commissioner of Inland Revenue v JFP Energy* [1990] 3 NZLR 536 (CA). See also *King-Ansell v Police* [1979] 2 NZLR 531, 540 (CA). See above.

This principle has, of course, since been further developed by the Court of Appeal in the immigration cases of *Tavita v Minister of Immigration*[74] and *Rajan v Minister of Immigration*[75] and later, substantively, in the more general context of *NZ Airline Pilots' Association v Attorney-General*[76] and *Wellington District Legal Services Committee v Tangiora.*[77] In the *Airline Pilots* case, in the judgment delivered by Keith J the Court said:[78]

> We begin with the presumption of statutory interpretation that so far as its wording allows legislation should be read in a way which is consistent with New Zealand's international obligations, eg *Rajan v Minister of Immigration* [1996] 3 NZLR 543 at p551. That presumption may apply whether or not the legislation was enacted with the purpose of implementing the relevant text. So this Court in interpreting guardianship legislation enacted to give effect to the Hague Convention on the Civil Aspects of International Child Abduction has said that it is incumbent on it to construe the Act in a manner that will as far as possible give effect to that purpose, *Gross v Boda* [1995] 1 NZLR 569 at pp573 and 574. And it read the general language of the Employment Contracts Act 1991 conferring jurisdiction on the Employment Court as not overriding the customary international law of sovereign immunity. In the absence of such an approach almost any general statute would displace well-settled doctrines accepted by New Zealand in its international relations, *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426 at pp430 and 438. In that type of case national legislation is naturally being considered in the broader international legal context in which it increasingly operates.

There have since been further developments in the application of this principle which are valuably discussed by Treasa Dunworth in "Public International Law".[79]

C Further Material bearing on Policy

More controversially, Sir Ivor has advanced the view that factual material should be put before the Court to demonstrate the economic and social implications of alternative approaches. He is concerned that Judges are informed and aware of the likely consequences of decisions. He does not exclude statutory interpretation from the areas in which such material may be helpful, in particular to the appellate judge, in choosing

74 *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).

75 *Rajan v Minister of Immigration* [1996] 3 NZLR 543 (CA).

76 *NZ Airline Pilots' Association v Attorney-General* [1997] 3 NZLR 269 (CA).

77 *Wellington District Legal Services v Tangiora* [1998] 1 NZLR 129 (CA) (affirmed on appeal see *Tangiora v Wellington District Legal Services* [2000] 1 NZLR 17 (PC)).

78 *NZ Airline Pilots' Association*, above, 289.

79 Treasa Dunworth "Public International Law" [2000] NZ Law Rev 217, 221.

between available options. At the same time he acknowledges a need for caution where such material has not been subject to trial scrutiny.[80]

The first question which arises here is how such material should come before the courts. Under section 42 of the Evidence Act 1908 Judges may properly take judicial notice of a wide range of statistical, economic and social data. Alternatively parties may seek to call it at trial or to have it admitted on appeal by leave.

Under our adversary system there may be no client interest, incentive or adequate resources available in a particular case, to enable counsel to explore the wider issues arising by making appropriate social inquiries. In the United States the technique of the amicus brief from the government or interested parties not directly involved in the litigation has been developed to fill the information gap.

In New Zealand in 1996 the Court of Appeal in *Z v Z (No 2)*[81] was concerned with whether the meaning of "property" in the Matrimonial Property Act 1976 covered the future earnings of spouses after their marital relationship had ended. To assist the Court on the range of public interest questions involved the Solicitor-General, at the request of the Court, appointed senior and junior counsel as amici. The intention was to ensure relevant contextual material was put before the Court and argument submitted from the public interest perspective. Two groups interested in the future earnings issue were also successful in obtaining amicus status to advance their own perspectives.[82] The process involved was novel in New Zealand, at least in its extent. It was criticised editorially with the Court being accused of stepping outside conventions for judicial decision making.[83]

In *Drew v Attorney-General*[84] the Court of Appeal granted an application by the New Zealand Council for Civil Liberties to intervene in an appeal concerning judicial review of findings against a prison inmate under prison disciplinary processes. The Court emphasised that the principal purpose of litigation was to resolve disputes between parties. Allowing outsiders to participate risked expansion of issues, elongation of appellate hearings and extra cost to the parties. The Court also had to be sensitive to the suggestion it was conducting a form of judicial inquiry into policy. On the other hand the appeals raising issues going to the public interest often required the Court to have regard

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80 The Rt Hon Justice Richardson "Judges as Law Makers in the 1900s" (Wilfred Fullagar Memorial Lecture) (1986) 12 Monash University Law Report, 35, 46.

81 *Z v Z (No. 2)* [1997] 2 NZLR 258 (CA).

82 *Z (No. 2)*, above, 273.

83 *Mark Henaghan "Are Future Earnings Matrimonial* Property?*" [1996] NZLJ 323.*

84 *Drew v Attorney-General* [2001] 2 NZLR 428 (CA).

to wide implications than those of immediate concern to the parties. Where assistance likely to be offered outweighed detriments to other interests the Court would permit intervention. The application of the New Zealand Council for Civil Liberties was granted on the basis it would file a written submission with the question of whether it would be heard orally reserved.

Factual material bearing on arguable alternative meanings of a statute is of course a contextual nature. Like other aspects of the context it can help clarify the meaning of statutory language by showing the setting in which it is to be considered. One reason given for why such facts can be considered on appeal, for the first time, is that they are not of such a character as to require adjudication at trial. Professor K C Davis, in his seminal discussion, distinguished what he described as *legislative* facts from *adjudicative* facts.[85] He said:[86]

> When an agency finds facts concerning immediate parties – what the parties did, what the circumstances were, what the background conditions were – the agency is performing an adjudicative function, and the facts may conveniently be called adjudicative facts. When an agency wrestles with a question of law or policy, it is acting legislatively, just as judges have created the common law through judicial legislation, and the facts which inform its legislative judgment may conveniently be denominated legislative facts. The distinction is important; the traditional rules of evidence are designed for adjudicative facts, and unnecessary confusion results from attempting to apply the traditional rules to legislative facts.

This distinction underlies the approach of the United States Supreme Court to ascertaining the factual contexts where a court or an administrative agency has had to determine matters of a "judgmental or predictive nature".[87] There is no requirement that legislative facts be indisputable before they are admitted. Davis has expressed that view, in 1964, citing the Supreme Court's decision in *Borden's Farm Products Co v Baldwin*.[88] He said:[89]

85 K C Davis "An Approach to Problems of Evidence in the Administrative Process" (1942) 85 Harv Law Rev 364.

86 Davis, above, 402-407.

87 See *Federal Communications Commission v National Citizens Committee for Broadcasting* (1978) 436 US 775, 813-814 citing earlier authorities in support.

88 *Borden's Farm Products Co v Baldw*in (1934) 293 US 194.

89 "A System of Judicial Notice Based on Fairness and Convenience", Perspectives of Law (1964) 69, 83.

> What the law needs at its growing points is more, not less judicial thinking about the factual ingredients of problems of what the law ought to be and the needed facts are seldom "clearly" indisputable.

In Australia, in *Gerhardy v Brown* Brennan J said: "When a Court in ascertaining the validity or scope of a law considers matters of fact, it is not bound to reach its decision in the same way as it does when it tries an issue between parties".[90]

In a very recent decision of the High Court of Australia McHugh J has endorsed this dictum and also expressed approval of an observation in Cross on Evidence that:[91]

> It is clear from the cases that judges have felt themselves relatively free to apply their own views and to make their own enquiries of social ethics, psychology, politics and history where relevant without requiring evidence or other proof.

In the High Court of New Zealand Jeffries J has used the Davis distinction between legislative fact, and adjudicative fact, to support a finding that the Indecent Publications Tribunal was entitled to assess for itself what amounted to evidence of injury to the public good.[92]

More recently issues of admissibility of legislative fact material arose in *Attorney-General v Prince and Gardner*.[93] Proceedings were brought against the Crown seeking damages for long term consequences of alleged negligence in placing the plaintiff for adoption and, years later, in failing to respond to indications of neglect of him by his adoptive parents thereafter. On appeal against the refusal of the High Court to strike out the proceeding, the Crown sought to submit affidavits giving evidence of a predictive nature concerning the impacts on social work practice of imposition of any liability in such circumstances. The evidence did not relate to the facts, but concerned assessments of the likely impact of imposing liability on the Crown for the then Department of Social Welfare in respect of acts and omissions of its social workers in their exercise of powers and performance of functions under children and young persons legislation. Deponents drew on their own expert knowledge of the discipline of social work, and in expressing opinions also relied on published academic literature which identified effects on the practice of

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90 *Gerhardy v Brown* (1985) 159 CLR 70, 141.

91 *Woods v Multi-Sport Holdings Pty Ltd* [2002] HCA 9, para 65. See also for a different view the judgment of Callinan J in the same case at paras 164-165.

92 *Comptroller of Customs v Gordon & Gotch (NZ) Ltd* [1987] 2 NZLR 81, 92 (HC) Jeffries J. The principle is now given legislative force by s 4 of the Films, Videos and Publications Classification Act 1993.

93 *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262 (CA). The author and Grant Liddell appeared as Counsel for the Attorney-General.

social work arising from prospects of liability for negligence or other torts. Another affidavit gave an assessment of the financial impact on provision for the Children and Young Persons' Service of what was said to be the substantial increase in investigative work that would be required if such governmental liability could exist.

The appellant sought to have the evidence admitted to assist the Court to be adequately informed on the central issue, which was whether the Court should allow liability for alleged negligent acts of social works. The application was strongly, and with some success, resisted by counsel for Mr Prince, Robert Chambers QC, who argued that the factual material was of a kind that should be evaluated at a trial and should not be considered on a strike out application. A majority (comprising Richardson P, Thomas and Keith JJ) in a judgment delivered by Richardson P agreed:[94]

> It is only where, on the facts alleged in the statement of claim, and however broadly they are stated, no private law claim of the kind or kinds advanced can succeed that it is appropriate to strike out the proceedings at a preliminary stage. And in that assessment the public policy considerations must be solidly founded in the relevant legislation, other relevant material, or the experience of the Courts. In some cases aspects of policy may require the kind of analysis and testing of expert evidence, including evidence of economic and social analysis, that is available only at trial. In other cases, policy considerations are patent. They may be explicit or implicit in the relevant legislation. They may be reflected in other areas of the law. Or the Courts may for reasons to which we shall come feel the considerations are readily identifiable and capable of evaluation and need not be the subject of evidence to be tested at trial.

However, the majority went on to say:[95]

> For reasons to which we shall come we are satisfied that there are specific powerful policy considerations relating to the adoption which are sufficiently self-evident and when taken together require the striking out of those causes of action.

The majority held that the cause of action based on the later complaint of neglect, but not that concerning the circumstances of the adoption, should proceed to trial. Chambers J, writing extra judicially, has since acknowledged the importance of empirical material arguing that it should ideally be produced at first instance so that it can be tested for reliability.[96]

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94 *Prince and Gardner*, above, 267-268.

95 *Prince and Gardner*, above, 268.

96 Robert Chambers "Current Sources of Law: A Commentary" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) 131, 134-135.

There are of course numerous cases in which material bearing on public policy assessment, which had not been available to the lower court, has been received on appeal. Examples include *Creednz v Governor-General,*[97] where an affidavit was received from the Secretary of the Cabinet containing a relevant Cabinet Paper and *Taiaroa v Minister of Justice*[98] where in a challenge to the conduct of the Maori Electoral Option a further affidavit from the responsible Minister was received on appeal.

The Court has also often applied section 42 of the Evidence Act 1908 to receive published material of the kind on which the affidavits submitted in *Attorney-General v Prince and Gardner*[99] case were premised. In *Te Runanga o Muriwhenua Inc v Attorney-General*[100] the Court held a report of the Waitangi Tribunal "to be admissible as a published book dealing with matters of public history".[101]

In the end, insofar as published works are concerned, the question is I suggest really one of judicial notice rather than admissibility of evidence. The United States approach certainly recognises a significant relaxation of traditional limits. In *Brown v Board of Education*[102] thirty-two social scientists signed a "Social Science Statement" appended to the brief of appellants' counsel. This summarised the general fund of psychological and social knowledge of the effects of the segregation of the black and white races.

Different Judges may be expected to wish to have greater or less regard to material of this kind, especially in interpretation of statutes. It is important to reiterate that it is contextual in its nature and its importance in any case may be only peripheral or it may be seen as displaced by the plain language of an enactment. Nevertheless, as my colleague Sir Kenneth Keith has pointed out, at this point our Courts have neither established theory nor well developed practice bearing on what evidence and wider material should be presented to the Court when issues of law involving broader issues of principle and policy have to be resolved.[103] Sir Ivor is one of the few who have drawn the attention of judges, practitioners and academic lawyers to the gap.[104] The basis on which judges should

97 *Creednz v Governor-General* [1981] 1 NZLR 172, 182 (CA).

98 *Taiaroa v Minister of Justice* [1995] 1 NZLR 417, 441 (CA).

99 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA).

100 *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641.

101 *Te Runanga o Muriwhenua Inc*, above, 653.

102 *Brown v Board of Education* (1954) 347 US 483.

103 Sir Kenneth Keith *From Professing to Advising to Judging* (unpublished paper, 1998) 9.

104 Rt Hon Sir Ivor Richardson "Public Interest Litigation" [1995] 3 Waikato LR 9, 12.

receive extra-statutory contextual information of this kind nevertheless presently remains elusive in New Zealand.

VII CONTROLLING PRESUMPTIONS

What then of the canons of interpretation in 2002? Willis, it will be recalled, took the view in 1937 that they had a "dual position as canons of legislative intent and weapons of judicial control."[105] Frankfurter, in 1947 described them as "generalizations of experience".[106] While in the abstract they rarely aroused controversy there were certainly difficulties when they competed and were in conflict.

One development over the past forty years is that particular canons may now be said largely to have been superseded by the purposive approach, most notably that penal statutes and tax statutes should be construed strictly. In the modern world such content is no longer regarded as in itself requiring that statutes be interpreted in a restrictive way. Parliament has indeed reinforced that common law development by enacting a specific, purposive principle of interpretation in the Income Tax Act 1994. Section AA3 (as substituted in 1996) provides:

> **AA3 Interpretation**
>
> Principle of interpretation
>
> (1) The meaning of a provision of this Act is found by reading the words in context and, particularly, in light of the purpose provisions, the core provisions and the way in which the Act is organised.

As Sir Kenneth Keith points out the final phrase could have been expressed simply as "the scheme of the Act".[107]

Professor Taggart, writing on "Expropriation, Public Purpose and the Constitution"[108] suggests purposive interpretation competes with background norms Judges bring to bear in judging particular exercise of expropriatory power. That is also true over a wider field where legislation addresses areas touching on those values regarded as of fundamental importance to our society. A striking recent example, in a judgment written by Richardson

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105 Professor John Willis "Statute Interpretation in a Nutshell" (1938) 16 Can Bar Rev 1, 18.

106 Felix Frankfurter "Some Reflections on the Reaching of Statutes" (1947) Colum Law Rev 527, 544.

107 Sir Kenneth Keith *Sources of Law, Especially in Statutory Interpretation* in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) 77, 86.

108 Professor Taggart "Expropriation, Public Purpose & the Constitution" in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Clarendon Press, Oxford, 1998) 91, 105.

P for a Court which was unanimous on the point is *Attorney-General v Choudry (No. 1)*.[109] The Full Court held that provisions in the NZ Security Intelligence Service Act 1969, which gave what had been thought by some within government to be wide powers to officers of the Security Intelligence Service to intercept communications, did not permit them to break into a dwellinghouse for that purpose. There was nothing in the statutory language and scheme to justify going behind a restrictive reading of the grant of invasive powers.[110] The fundamental value in issue was of course one that went back to *Entick v Carrington*.[111]

In passing I note that the legislation was amended by the NZ Security Intelligence Service Amendment (No 2) Act 1999. The public policy question raised by the Court's decision was plainly one to be addressed, if at all, by Parliament affecting as it did basic common law provisions.

Sir Ivor's judicial philosophy in such matters is reflected in an address he gave in 1984 when he said: "What is important is to recognise that the judges are not directly representative of our society in the same sense as are the politicians. They should not be seen as a political force prepared to move into action to undermine the government of the day; and whether of the left or the right. At the same time, the courts must stand between citizen and citizen and between the citizen and the state, and not abdicate responsibility for correcting the abuse complained of to other branches of government. Parliament is then free at any time to deal with the matter for the future by appropriate legislation."[112]

In *NZ Stock Exchange v Commissioner of Inland Revenue*[113] the appellants sought to confine a statutory provision empowering the Commissioner to require production of information so that it applied only to a specified taxpayer whose tax affairs were under investigation. The social value with which such a restricted interpretation of the power would accord was the confidentiality of relationships between the bankers and sharebrokers, who had been required to provide the information, and their clients.

The Court of Appeal in a judgment delivered by Richardson J found that the scheme of the Act contained its own balancing of privacy interests and effective mechanisms for ascertaining liability for tax. In this light the confidentiality of the relationships concerned

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109 *Attorney-General v Choudry (No 1)* [1999] 2 NZLR 582 (CA).

110 *Choudry (No 1)*, above, 592.

111 *Entick v Carrington* (1765) 19 State Tr 1029; 95 ER 807 (CP).

112 Rt Hon Sir Ivor Richardson "Judges as Policymakers" (1985) 15 VUWLR 46, 51. See also *R v Hines* [1997] 3 NZLR 529 (CA) per Richardson P and Keith J.

113 *NZ Stock Exchange v Commissioner of Inland Revenue* [1990] 3 NZLR 333 (CA); [1992] 3 NZLR 1 (PC).

could not support a reading down of the plain language.[114] The Privy Council agreed. Lord Templeman said of the implied limitation argument:[115]

> It is impossible to insert that limitation as a matter of statutory construction. The limit could be inserted as a matter of policy only by a process of judicial legislation on the grounds that Parliament could not have intended to confer on the Commissioner a power so wide as not to be subject to such a limitation.

In the area of fundamental rights Parliament has of course given statutory effect to a Bill of Rights principle of interpretation by enacting section 6 of the New Zealand Bill of Rights Act 1990 under which a tenable meaning consistent with rights and freedoms contained in the Bill of Rights is always to be preferred. But beyond that the area of human rights the extent to which Courts revert to restrictive canons of interpretation in preference to a purposive approach has clearly diminished. This appears to be the direct result of the firm establishment in New Zealand of the purposive principle of interpretation in statutory interpretation by the year 2000.

VIII THE NEW LOOK SECTION 5(J)

To bring the statutory position up to date I note that section 5(j) was repealed, and a more modern expression of the purposive interpretation direction substituted, in the Interpretation Act 1999. In recommending the retention of a section 5(j) type of direction the Law Commission was persuaded by the democratic argument. The declaratory statement emphasised the central position of statute law in our legal system and enhanced the likelihood of interpretation consistent with democratic theory.[116] The present provision simply says:

> **Ascertaining meaning of legislation**
>
> (1) The meaning of an enactment must be ascertained in light of its text and in the light of its purpose.
>
> (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
>
> (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

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114 *NZ Stock Exchange*, above, 338 (CA).

115 *NZ Stock Exchange*, above, 4 (PC).

116 New Zealand Law Commission *A New Interpretation Act to Avoid "Prolixity and Tautology"* (NZLC R17, Wellington, 1990).

It is important to bear in mind that the Interpretation Act is expressed in abbreviated and plain language with the aim of making statute law more accessible to the many non lawyers who must read it. There is no reference to reading the text in its context in the new provision, although there was such a reference in the Law Commission's draft.[117] The explanatory note to the Bill as introduced offers this explanation:[118]

> *Clause* 5 confirms the purposive approach to the interpretation of legislation inherent in section 5(j) and adopted by the Courts in New Zealand. The importance of purpose is recognised by including *clause* 5 as a separate clause in *Part* 2 of the Bill.
>
> That clause does not, however, adopt the Law Commission's recommendation that the clause also refer to the context of the legislation. There are 2 principal reasons for this. First, the term "context" is imprecise. Second, the discussion of the concept in the Law Commission's report (paras. 71 and 72) suggests a meaning that might well go beyond the approach of the Courts currently in interpreting legislation.

A reading of the passages in the Law Commission report suggests the Government's concern was with the breadth of the context. All that can perhaps be said for certain of this difficult explanation, however, is that the omission is not intended to alter the present dominant place of the purposive approach in the reading of New Zealand statutes. As Professor Burrows has observed in any sensible process of interpretation context cannot be ignored.[119]

IX CONCLUSION

In New Zealand the Judges of the Court of Appeal had, by 2000, undoubtedly shifted the emphasis in statutory interpretation to focus their approach on the purpose of legislation while adhering to the judicial task of interpreting the words used. In retrospect, Ward and Willis can be seen as largely vindicated for their criticisms.

The purposive approach, as anticipated, has required greater reference to contextual material found outside the statute itself. The limits of legitimate contextual reference are not yet defined – especially in the area of empirical material. The purposive approach, however, is not the sole approach that New Zealand Judges apply. Perceptions of community values remain a force in particular areas of legislation although not to the extent they were in 1960. When they are in point they sometimes result in more literal interpretations. The most important qualification of the purposive approach has of course been recognised by Parliament itself in section 6 of the Bill of Rights Act.

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117 New Zealand Law Commission *The Format of Legislation* (NZLC R27, Wellington, 1993) 4.

118 Interpretation Bill 1997.

119 John F Burrows, *Statute Law in New Zealand* (2ed, Butterworths, Wellington, 1999) 184.

The judicial leader this conference honours has been at the forefront of the development of the purposive approach to interpretation and has made a major contribution to judicial technique in reading statutes.